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Olympus Hills Shopping Center, Ltd., a Utah limited partnership v. Smith\'s Food & Drug Centers, Inc., a Delaware corporation : Petition for Rehearing

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

OLYMPUS HILLS SHOPPING CENTER, LTD., a Utah limited partnership, Plaintiff and Appellee, v. SMITH'S FOOD & DRUG CENTERS, INC., a Delaware corporation, Defendant and Appellant.	:	PETITION FOR REHEARING OF APPELLANT SMITH'S FOOD & DRUG CENTERS, INC. Appeal No. 930531

ON APPEAL FROM THE THIRD DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE MICHAEL R. MURPHY

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Plaintiff and Appellee,	:	
v.	:	
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TABLE OF CONTENTS

Page

REHEARING ISSUES 1

I. OLYMPUS HILLS' NOTICE OF TERMINATION DID NOT CONTAIN A NOTICE OF "ALTERNATIVE OF PERFORMANCE" AS REQUIRED FOR UNLAWFUL DETAINER 2

II. OLYMPUS HILLS' NOTICE OF DEFAULT WAS INSUFFICIENT FOR EITHER LEASE FORFEITURE OR TREBLE DAMAGES FOR UNLAWFUL DETAINER 4

III. THE COURT ERRED IN HOLDING THAT THE DUTY OF GOOD FAITH AND FAIR DEALING LIMITED SMITH'S RIGHT TO CHANGE USES UNDER THE LEASE TO A "REASONABLE ECONOMIC USE" 7

IV. THE COURT ERRED IN HOLDING THAT THE DISTRICT COURT PROPERLY REFUSED TO INSTRUCT THE JURY THAT SMITH'S HAD NO DUTY TO OPERATE AN ANCHOR TENANT-TYPE STORE 10

A. ANCHOR-TENANT DUTIES ARE INCONSISTENT WITH AN UNRESTRICTED USE CLAUSE 11

B. IN THE PRESENT CASE, ANCHOR-TENANT DUTIES IMPERMISSIBLY CONFLICTED WITH SMITH'S ABSOLUTE RIGHT TO OPERATE A NON-SUPERMARKET BUSINESS 12

C. THE DISTRICT COURT'S RULINGS ON ANCHOR TENANCY WERE PREJUDICIAL 15

CONCLUSION 15

TABLE OF AUTHORITIES

Cases	Pages
Bentley v. Potter, 694 P.2d 617 (Utah 1984)	3, 4
Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989)	10
Bradlees Tidewater v. Walnut Hills Inv., 239 Va. 468, 391 S.E.2d 304 (1990)	11, 12
Brehany v. Nordstrom, Inc., 812 P.2d 49 (Utah 1991)	8
Brown v. Safeway Stores, Inc., 617 P.2d 704 (Utah 1980)	12
Dang v. Cox Corp., 655 P.2d 658 (Utah 1982)	4, 6
Dickey v. Philadelphia Minit-Man Corp., 377 Pa. 549, 105 A.2d 580 (1954)	9
Evans v. Grand Union Co., 759 F. Supp. 818 (M.D. Ga. 1990)	11
Hilton Hotels Corp. v. Butch Lewis Prod., Inc., 107 Nev. 226, 808 P.2d 919 (1991)	9
Mercury Inv. Co. v. F.W. Woolworth Co., 706 P.2d 523 (Okla. 1985)	8, 9, 12
Piggly Wiggly S., Inc. v. Eastgate Assoc., Ltd., 195 Ga.App. 10, 392 S.E.2d 337 (1990)	11
Pingree v. Continental Group, Inc., 558 P.2d 1317 (Utah 1976)	1, 2
Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497 (Utah 1980)	7, 8, 13
Russell v. Park City Utah Corp., 548 P.2d 889 (Utah), cert. denied, 429 U.S. 860 (1976)	4
Stop & Shop, Inc. v. Ganem, 347 Mass. 697, 200 N.E.2d 248 (1964)	9
Ted R. Brown & Assoc. v. Carnes Corp., 753 P.2d 964 (Utah Ct. App. 1988)	8
Williams v. Safeway Stores, Inc., 198 Kan. 331, 424 P.2d 541 (1967)	7

Zeese v. Estate of Segal, 534 P.2d 85 (Utah 1975) 7

Statutes

Utah Code Ann. § 78-36-1 (1992) 1, 2

Utah Code Ann. § 78-36-3 (1986) 2

Miscellaneous

Steven J. Burton, Breach of Contract, and the Common Law Duty to Perform in Good Faith, 94 Harv.L.Rev. 369 (1980) 9

Annotation, Relief against forfeiture of lease for nonpayment of rent, 31 A.L.R.2d 321 (1953) 4

REHEARING ISSUES

Pursuant to Rule 35, Utah Rules of Appellate Procedure, Appellant Smith's Food & Drug Centers, Inc. ("Smith's"), respectfully petitions the Court for a rehearing on the following issues decided in the Court's December 29, 1994, written opinion ("Opinion") affirming the judgment in favor of Olympus Hills Shopping Center, Ltd. ("Olympus Hills"):

1. The Court erred by holding that Olympus Hills' Notice of Default satisfied the "alternative of performance" requirement of the Utah Unlawful Detainer statute, when by statute the "alternative of performance" must be contained in the Notice of Termination (Opinion Issue 5).

2. The Court impermissibly shifted to the lessee the burden of ambiguity in a default notice by holding that Olympus Hills' Notice of Default was sufficient for forfeiture of the Lease and unlawful detainer treble damages when, strictly construing that notice, the only alleged default that was tied to possible forfeiture was the fact of closure, which the jury determined was not a default (Opinion Issue 5).

3. The Court's holding that the duty of good faith restricted Smith's discretion in changing uses to an economically "reasonable" use erroneously conflicts with the well established Utah law favoring unrestricted use of leased premises (Opinion Issue 1).

4. The Court erred by holding that the duty of good faith may be used to impose a duty on Smith's to operate an anchor-tenant type business despite direct lease language to the contrary, and by holding that the district court's refusal to so instruct the jury did not constitute reversible error (Opinion Issues 3 and 4).

I. OLYMPUS HILLS' NOTICE OF TERMINATION DID NOT CONTAIN A NOTICE OF "ALTERNATIVE OF PERFORMANCE" AS REQUIRED FOR UNLAWFUL DETAINER

Smith's is entitled to dismissal of Olympus Hills' unlawful detainer claim because the Notice of Termination did not contain the required "alternative of performance." The Court correctly recognized that in the present case, the Utah Unlawful Detainer Statute, Utah Code Ann. § 78-36-3(1)(e) (1992), required that Olympus Hills give to Smith's a notice of an "alternative of performance" prior to invoking the treble damage remedy in that statute. (Opinion at p. 23; cf. Appellant's Brief at p. 47; Appellant's Reply Brief at p. 26.) The Court, however, erroneously held that the content of Olympus Hills' Notice of Default, dated April 27, 1990, satisfied this notice requirement.[1] (Opinion at pp. 23-24.) This finding was in error because the Utah Supreme Court held in Pingree v. Continental Group of Utah, Inc., 558 P.2d 1317 (Utah 1976), that the alternative of performance must be contained in the Notice of Termination, and not the Notice of Default as in this case.

In Pingree, the landlord sent a notice of default providing for a thirty-day cure period. After the expiration of the cure period, the landlord then sent a notice of forfeiture that did not contain the alternative of performance. The court refused any award of treble damages for unlawful detainer:

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[1]The Court stated:

> Smith's alleges that the April 27, 1990 letter does not contain the required "alternative of performance" and that the letter's reference to the contractual cure period does not satisfy the statutory requirement. The letter states that "[i]n the event that Smith's does not immediately re-open and continuously conduct normal business operations in the premises, Olympus Hills will terminate the Lease . . . as well as seek damages and all other available legal relief for the breach." We believe this language expresses the alternative of performing or surrendering the property. Thus, the notice of default met the requirements of section 78-36-3(1)(e).

(Opinion at pp. 23-24 (emphasis added).) Judge Bench dissented from the majority holding on the ground that Olympus Hills' acceptance of rent waived the alleged default. (Opinion at pp. 33-34 (Bench J., dissenting).)

> Plaintiff initially sent a letter to defendant on September 24, 1974, setting forth deficiencies in the maintenance of the premises. Plaintiffs stated, if the deficiencies were not corrected within thirty days, "you are hereby notified of lessors intent to forfeit, cancel and terminate this lease. . . ."
>
> . . . On February 26, 1975, plaintiffs served notice on defendant, which stated they "hereby declare a forfeiture" of the lease for the lessee's failure to correct the deficiencies set forth in the letter of September 24, 1974.
>
> . . .
>
> [P]laintiffs' declaration of forfeiture was not conditional as required by 78-36-3(5). This court has consistently ruled a notice of forfeiture is sufficient to terminate a lease for breach of a covenant, but it is not sufficient to place the lessee in unlawful detainer. This for the reason the statute requires an alternative notice, viz., the tenant either perform, or quit; before he can be held in unlawful detainer, and be subject to treble damages.

Id. at 1322 (emphasis added).[2] The Pingree ruling is logical because at the time of service of a notice of default, the lessor has no right to demand performance or surrender of the property within three days of that notice. The right to demand surrender of the premises only accrues after the expiration of the cure period in the Lease and upon service of a notice of termination.

The notices in this case are indistinguishable from those in Pingree. Although the notice of default in Pingree provided the lessee with the alternative of curing the alleged default, the Court barred the lessor from recovering treble damages because the subsequent notice of termination did not contain the required alternative of performance. Olympus Hills has not, and could not argue that the Notice of Termination in this case contained the required alternative of performance. Consequently, the treble damage award must be reversed.

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[2]Utah Code Ann. § 78-36-3(5) (1986), was the predecessor to Utah Code Ann. § 78-36-1(e) (1992).

II. OLYMPUS HILLS' NOTICE OF DEFAULT WAS INSUFFICIENT FOR EITHER LEASE FORFEITURE OR TREBLE DAMAGES FOR UNLAWFUL DETAINER.

Smith's is entitled to dismissal of Olympus Hills' claims for Lease forfeiture and unlawful detainer because the Notice of Default, strictly construed, did not tie the length of closure to possible forfeiture of the Lease. Utah law requires that a notice of default must "plainly indicate the nature of the default ... and give reasonable notice that failure to cure the default within the time allowed may lead to termination." Bentley v. Potter, 694 P.2d 617, 620 (Utah 1984). The Court did not recognize, however, that it must "strictly" construe notices in evaluating the sufficiency of a notice that may lead to forfeiture. See, e.g., Russell v. Park City Utah Corp., 548 P.2d 889, 891 (Utah), cert. denied, 429 U.S. 860 (1976). The burden or risk of any ambiguity in the notice must be borne by the lessor which drafted the notice. Dang v. Cox Corp., 655 P.2d 658, 662 (Utah 1982). Thus, the Court impermissibly shifted the burden of ambiguity in a notice to the lessee, Smith's, when the Court did not strictly construe the Notice of Default as to whether Olympus Hills tied the length of closure to the possibility of forfeiture.

First, the Court indicated that reference in the Notice of Default to the provision allegedly breached was sufficient because "[i]t would be an unfair burden to require Olympus Hills to anticipate at the time of a breach exactly how litigation would evolve in interpreting this lease provision and what the jury would find" and, consequently, the reference to closure as a breach in the Notice of Default was sufficient. (Opinion at p. 23.) However, such a rule is fundamentally inconsistent with strict construction of notices leading to forfeiture, which policy places the risk of ambiguity upon the lessor who drafts the notice. A Notice of Default must not merely identify the breached

provision, but must also "plainly indicate the nature of the default or breach." Bentley v. Potter, 694 P.2d 617, 620 (Utah 1984). This requires a sufficient description of the conduct constituting the alleged breach so that the allegedly breaching party may know what actions can be undertaken to cure the alleged default and avoid forfeiture.[3] Id. (notice must be sufficient to put lessee on notice that "failure to cure" will cause termination). Mere knowledge that Olympus Hills considered Smith's closure to be a violation of the continuous operation clause in the Lease did not "plainly indicate" that an accelerated remodeling/conversion schedule would cure the alleged default and avoid forfeiture, a course Smith's could have followed.[4]

Second, the Court stated that the reference in the Notice of Default that the "'substantial period proposed by Smith's to remodel the premises' was unreasonable" sufficiently notified Smith's of the nature of the alleged default. (Opinion at p. 23.) However, strictly construing the notice, that reference did not indicate that the length of closure was tied to possible forfeiture of the lease and that accelerating the construction schedule would avoid forfeiture of the Lease. The Notice of Default, dated April 27, 1990, provides in relevant part as follows:

> The termination of Smith's business operations at the Shopping Center for any period of time, let alone 60 days, has had and will continue to have a devastating and

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[3]In Bentley, the Utah Supreme Court cited favorably to Annotation, Relief against forfeiture of lease for nonpayment of rent, 31 A.L.R.2d 321, § 18 (1953). Bentley, 694 P.2d at 620. Section 18 of that annotation is consistent with Smith's argument that the notice must provide sufficient information to enable Smith's to know what conduct must be undertaken to cure the alleged default: "The notice or declaration of forfeiture, when required, must . . . furnish[] complete information and therefore must state its purpose, the amount claimed, and the time and place of payment". 31 A.L.R.2d at 387.

[4]Consistent with the policy disfavoring forfeiture, the default description must be contained in the Notice of Default and a lessee's alleged subjective knowledge of the nature of the alleged default does not satisfy the notice requirement. (Appellant's Reply Brief at pp. 23-24 (cases cited).)

> adverse impact on the established shopping patterns, traffic and buying habits of customers at the Shopping Center. Our client views the substantial period proposed by Smith's to remodel the premises, as a action of Smith's, in bad faith, to change shopping habits and to divert customers away from the Olympus Hills Shopping Center to Smith's newly opened supermarket and drug center on 3300 South 3100 East. Smith's action in termination operations on April 24, 1990 is inconsistent with its course of conduct in 1985 when the Smith's store remained open notwithstanding the substantial remodeling project conducted to renovate the Skaggs space.
>
> In the event Smith's does not immediately re-open and continuously conduct normal business operations in the premises, Olympus Hills will terminate the Lease pursuant to paragraph 15 of the Lease Agreement as well as seek damages and all other available legal relief for the breach.

(R. 01014-16 (emphasis added).)

Strictly construing this letter, the only conduct identified as a possible cure for the alleged default to avoid possible termination of the Lease was the immediate reopening of the business (and remodeling while the store was open). Nowhere does Olympus Hills notify Smith's that a shorter remodeling schedule would cure part or all of the alleged default and avoid forfeiture of the Lease. In fact, immediately following the reference cited by the Court, Olympus Hills' letter stated that past remodeling occurred while Smith's store remained opened and then threatened forfeiture if Smith's did not "immediately re-open" the store. Thus, Olympus Hills' Notice of Default was insufficient to forfeit the Lease or to create unlawful detainer. Any ambiguity as to the nature of the default was Olympus Hills' responsibility and, under Utah law, it -- not Smith's -- must bear the burden of that ambiguity. Dang v. Cox Corp., 655 P.2d at 661.

III. THE COURT ERRED IN HOLDING THAT THE DUTY OF GOOD FAITH AND FAIR DEALING LIMITED SMITH'S RIGHT TO CHANGE USES UNDER THE LEASE TO A "REASONABLE ECONOMIC USE"

The Court held that "Olympus Hills justifiably expected that Smith's would select a reasonable economic use for the property in good faith" and that the district court properly submitted to the jury Olympus Hills' claim under the use clause in the Lease.[5] (Opinion at p. 7.) The Court's use of the duty of good faith and fair dealing to limit to a "reasonable economic" use Smith's right to change use under the Lease is an unprecedented ruling and inconsistent with Utah public policy favoring "free use" of leased premises in the absence of any express or necessarily implied limitation on use in a lease.

Settled public policy in Utah favors unrestricted use of leased premises. In Zeese v. Estate of Siegel, 534 P.2d 85 (Utah 1975), the Utah Supreme Court stated:

> A lessee is entitled to use the premises for any lawful or valid purpose without interference on the part of the landlord, so long as the use is not forbidden by express provisions of the lease or by some necessarily implied construction thereof, and does not amount to waste or destruction of the property.

Id. at 89 (footnote omitted).[6] Thus, in the absence of express or implied-in-fact covenants in a lease or an assertion of waste, a lessee has an unrestricted right to select the use for the leased premises.[7]

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[5]Judge Bench dissented from the Court's holding on the claims under the use clause of the Lease. (Opinion at pp. 27-33 (Bench, J., dissenting).)

[6]This policy has been demonstrated in the numerous cases holding that there is no reasonable consent limitation on a right to assign a lease where there is no express or implied-in-fact limitation in the lease on assignment. See, e.g., Williams v. Safeway Stores, Inc., 424 P.,2d 541,548 (Kan. 1967) (restrictions against assignment are not favored and are not extended by implication).

[7]The duty of good faith in the context of an unlimited use clause could still be used to prohibit the change to an illusory or sham use, such as the proverbial cigar store or lemonade stand -- a situation not involved in this case.

The district court properly ruled, as a matter of law, that there was no express limitation on use in the Lease. Olympus Hills' has never argued that there was an implied-in-fact limitation on use. Consequently, in light of Utah's policy of unrestricted use on leaseholds, the Court's utilization of the duty of good faith to impose on Smith's an obligation to choose an economically reasonable use for the leased premises is impermissibly inconsistent with and contradicts Smith's express rights under the Lease. See, e.g., Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497, 505 (Utah 1980); Brehany v. Nordstrom, Inc., 812 P.2d 49, 55 (Utah 1991); Ted R. Brown & Assoc. v. Carnes Corp., 753 P.2d 964, 970-71 (Utah Ct. App. 1988).

The analysis adopted by the Court thus allowed the jury to impermissibly rewrite the carefully negotiated use provision of the Lease. See Ted R. Brown & Assocs. v. Carnes Corp., 753 P.2d 964, 970 (Utah Ct. App. 1988). Olympus Hills could have negotiated a lease that either expressly protected expectations of anchor tenancy or business productivity, or that conditioned a change in use upon Olympus Hills' reasonable consent. However, it did not do so, and to limit a lessee's discretion by implying such an expansive and uncertain obligation as "commercial reasonableness" would be, in actuality, a redrafting of the Lease to add a term that Olympus Hills was unable to obtain through negotiation. The Court "should be loath to hold [Smith's] to any greater level of business productivity than [Olympus Hills] itself was able to exact from [Smith's]." Mercury Inv. Co. v. F.W. Woolworth, Inc., 706 P.2d 523, 532 (Okla. 1985).

The Court's holding is without precedent. In none of the cases cited by Olympus Hills or the Court does the duty of good faith limit a lessee's right to change use in the face of an unrestricted use clause.[8]

The Court's holding as it now stands will cause substantial confusion and uncertainty in the leasing industry. A duty to have a "reasonable economic use" is a "vague," "uncertain," "amorphous," and "generally impracticable" standard with little predictability. See, e.g., Dickey v. Philadelphia Minit-Man Corp., 105 A.2d 580, 582 (Pa. 1954); Mercury Inv. Co. v. F.W. Woolworth Co., 706 P.2d 523, 532 (Okla. 1985). Given the Court's ruling, the jury's role in the context of good faith and fair dealing means that anytime a lessee changes use or assigns or subleases (even if there is expressly no restriction on use or assignment in a lease), a lessor may now assert a violation of a duty of good faith and fair dealing, which could only be determined well after the fact by a jury based on conflicting expert testimony as to the economic reasonableness of the new use. Consequently, a lessee must either obtain the consent of the landlord prior to a change in use or an assignment of the lease, or face the prospect and uncertainty of

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[8]The only precedent cited by the Court considering the role of the duty of good faith and fair dealing in the lease context was to percentage rent cases. (Opinion at p. 7 (citing Hilton Hotels Corp. v. Butch Lewis Prod., Inc., 808 P.2d 919, 923-24 n. 6 (Nev. 1991) (citing Burton, Breach of Contract, and the Common Law Duty to Perform in Good Faith, 94 Harv.L.Rev. 369, 384-85 (1980)).) However, in the present case, based on the district court's unappealed rulings, the duty of good faith with respect to the percentage rent clause did not limit Smith's right to conduct business operations on the premises. (R. 3522-24.) In any event, the Burton percentage lease example was nothing more than recognition of the rule for implied-in-fact covenants in percentage rent cases. For example, Burton derived the rule, in part, from the decision in Stop & Shop, Inc. v. Ganem, 200 N.E.2d 248 (Mass. 1964), where the court found no implied-in-fact covenant of continuous operation in a percentage rent lease. The court also held that an allegation of bad faith did not change the result:

> The allegation "not in good faith" adds nothing to the facts stated. In context, it says no more than that the plaintiff has acted in violation of implied obligations of the lease.

Id. at 253. Judge Murphy came to the same conclusion. (R. 3521 ("Woodland is not a case of good faith and fair dealing. However, in the context of this case, ... I think that there's a difference without a distinction.").)

extended litigation. Under the Court's ruling, it is difficult, if not impossible for lessees to draft use language with any certainty or predictable outcome. The Utah Supreme Court has already criticized the use of the duty of good faith and fair duty without predictable guidelines in the employment context. Berube v. Fashion Centre, 771 P.2d 1033, 1051-52 (Utah 1989)(Zimmerman, J.).

IV. THE COURT ERRED IN HOLDING THAT THE DISTRICT COURT PROPERLY REFUSED TO INSTRUCT THE JURY THAT SMITH'S HAD NO DUTY TO OPERATE AN ANCHOR TENANT-TYPE STORE

The Court also held that the district court did not err in refusing to instruct the jury that Smith's had no duty to operate an anchor-type business because the duty of good faith "required Smith's to select a reasonable economic use for the leased space" and that duty "might have required [Smith's] to operate as an 'anchor tenant'". (Opinion at p. 16 (emphasis added).) Even if the duty of good faith could limit Smith's selection among non-anchor retail uses, any duty of Smith's to select an anchor-type business would impermissibly conflict with and contradict the express language of the Lease in this case for two reasons. First, courts have repeatedly recognized that an unrestricted use clause gives a tenant unlimited discretion to change to a non-anchor business because anchor-tenant duties are inconsistent with an unlimited use clause. Second, in the present case, there was no evidence that anything other than a supermarket could have operated (or would have been considered for operation by Olympus Hills) as an anchor tenant in Smith's space. Thus, even if Olympus Hills had adduced evidence that there were "commercially reasonable" non-supermarket uses for the leased premises (which it did not do), Olympus Hills' argument regarding anchor tenancy impermissibly conflicted with the use clause and was nothing more than an attempt to restrict Smith's use of the leased premises to a

supermarket. Consequently, the district court's refusal to so instruct the jury constituted reversible error.

A. ANCHOR-TENANT DUTIES ARE INCONSISTENT WITH AN UNRESTRICTED USE CLAUSE

The Lease provided Smith's with the unrestricted right to operate either a "supermarket" or "any other lawful retail selling business not in conflict or competition with another major tenant in the shopping center." (Lease ¶ 4.01.) As the district court ruled (which ruling has not been appealed), the Lease imposed no obligation on Smith's to generate any level of sales or percentage rents. (R. 3522-24.) Consequently, any limitation of Smith's right to change uses to a specific category of uses, especially a category of uses that is intended to generate certain levels of traffic or business, such as an anchor-type business is inconsistent with the express right in the use clause to select among the entire range of "lawful retail selling business[es] not in conflict or competition with another major tenant in the shopping center."

The Court's opinion fails to cite or address the line of which have routinely held that anchor-tenant duties are inconsistent with an unrestricted use clause. See Bradlees Tidewater v. Walnut Hills Inv., 391 S.E.2d 304 (Va. 1990) (right to operate "any lawful retail business" precludes anchor-tenant duty); Evans v. Grand Union Co., 759 F. Supp. 818, 823 (M.D. Ga. 1990)(even if anchor-tenant status represents the "business realities" in shopping centers, such status may not be used to imply obligations inconsistent with the underlying lease)(citing Piggly Wiggly S., Inc. v. Eastgate Assoc., Ltd., 392 S.E.2d 337, 340 (Ga. Ct. App. 1990)(implied "anchor tenant" duties were precluded where the lease permitted "use [of the] premises in any lawful manner, was freely assignable and . . . expressly disclaimed any representation or warranty

as to the sales volume")); cf. Mercury Inv. Co. v. F.W. Woolworth Co., 706 P.2d 523 (Okla. 1985)(percentage rent disclaimer excludes implied covenant to generate percentage rent or customer traffic); Brown v. Safeway Stores, Inc., 617 P.2d 704, 710-12 (Wash. 1980)(unlimited right to sublease was inconsistent with implied obligation to "operate and assign in a commercially reasonable manner" even for an anchor tenant).[9] As the Virginia Supreme Court held in Bradlees Tidewater v. Walnut Hill Investment, 391 S.E.2d 304 (Va. 1990):

> It is obvious why Walnut Hill wants to abandon its "anchor tenant" theory. The theory is seriously flawed. Under the plain language of the lease in this case, an assignee or sublessee was required to play the role of anchor tenant only during the first five years of the lease, and that period has long since expired.
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> . . .
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> Hence since the five-year period has expired, [the assignees] may conduct any lawful retail business, not just a Bradlees-type department store or one otherwise qualifying as an anchor....

Id. at 308 (emphasis in original).

This Court's departure from this established law of other jurisdictions will inevitably create costly and chaotic uncertainty in commercial lease settings. Consequently, as a matter of law, Smith's had no duty to operate an anchor-type business and the district court erred when it refused to so instruct the jury.

B. IN THE PRESENT CASE, ANCHOR-TENANT DUTIES IMPERMISSIBLY CONFLICTED WITH SMITH'S ABSOLUTE RIGHT TO OPERATE A NON-SUPERMARKET BUSINESS

As long as Smith's operated a supermarket, the Lease provided that Smith's had the "exclusive" right to operate a supermarket at Olympus Hills. Thus, the only contractual consequence of a decision by Smith's

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[9]As was noted in Smith's Reply Brief, the distinction between a constructive covenant of good faith and an implied-in-fact covenant to operate an anchor-type business is immaterial to evaluating whether the alleged duty is inconsistent with the express terms of the use clause. (Appellant's Reply Brief at p. 9 n. 7, p. 15 n. 14.)

to cease supermarket operations under the negotiated Lease would be the loss of its exclusivity rights. Any limitation on Smith's right to cease supermarket operations (in favor of other lawful retail selling businesses) is inconsistent with the express language of the Lease (even if Smith's selection of a new use from the array of lawful retail selling businesses were to be limited by the duty of good faith). See Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497, 505 (Utah 1980) (where contract provided alternate royalty formulas, the duty of good faith could not restrict the parties' discretion in making the selection).

There was no evidence that there was a non-supermarket anchor tenant that would have been suitable for the Olympus Hills space. Consequently, the district court's refusal to instruct the jury that Smith's had no duty to operate as an anchor tenant impermissibly conflicted with Smith's right to change to a non-supermarket type use.

The Court erroneously pointed to the testimony of Olympus Hills' experts, Mr. Throndsen and Mr. Brubaker, where they defined the "highest and best use" and an "economically reasonable use," as "suggest[ing]" that there were reasonable non-supermarket uses.[10] However, neither Mr. Throndsen nor Mr. Brubaker testified that there was any non-supermarket reasonable use for the lease space. In voir dire, Mr. Throndsen, an Olympus Hills expert, testified that "a major service grocery store operator is the only one who can pull traffic to that center, and that's where the most value is lost in the other tenant space because of that drop in traffic." (R. 2645 at p. 295 (emphasis added); see also R. 2645 at pp. 275-76, 290-91 (supermarket or "second generation tenant").) And

[10]Neither the Court nor Olympus Hills ever identified any non-supermarket anchor-type uses for the space. Even if there had been evidence of a non-supermarket reasonable use (which there was not), there still was no evidence of a non-supermarket anchor-type use for the Smith's premises.

Mr. Brubaker testified that, "It is my opinion that no tenant can make a[n adequate] return on their investment other than a supermarket in 1990 on that space" and that an anchor tenant supermarket was the "key" to success of a neighborhood shopping center such as Olympus Hills.[11] (R. 2645 at pp. 15, 59.) In light of the above, testimony, the Court erroneously inferred from the respective definitions of highest and best use and a reasonable use that there was a reasonable non-supermarket anchor-type use. (Cf. Opinion at p. 11 (highest and best use is a reasonable use.)

The Court's opinion suggests it did not consider the testimony of Don Nelson, Olympus Hills' leasing agent, who unequivocally testified that a supermarket was the only anchor tenant suitable for the Smith's space and that uses that may otherwise have been considered as anchor tenants in other space, such as Gart Sporting Goods, would not have been so considered in Smith's space. (R. 3947-50.) Moreover, at the time of the alleged default, Olympus Hills clearly took the position that it would not approve a sublease of the Smith's space except to a

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[11]Mr. Brubaker testified as follows:

> Q. Mr. Brubaker, is it your opinion that no tenant is going to want to occupy this space other than the supermarket in 1990?
> A. It is my opinion that no tenant can make a return on their investment other than a supermarket in 1990 on that space.
> Q. By return of investment, if someone shows a dollar profit a year, does that come within your return of investment criteria?
> A. Let me say an adequate return on their investment.
> . . .
> Q. A lot of other types of business[es] could make a profit and get an adequate return on their investment other than a big supermarket combo store, couldn't they.
> A. I do not think so. . . .
> . . .
> A. I believed that some, not a lot, there may be some other uses that could make a profit in that location. I believe that the probability of profitability for those other uses would not be near as great as the use as a supermarket.

(R. 2645 at pp. 59, 73.) Thus, even though there may be a few non-supermarket uses that could generate a profit (which was not Mr. Brubaker's definition of a reasonable economic use), only a supermarket could generate an "adequate return" on investment (which was his definition).

supermarket. (R. 5189-92, 5210, 5215-18, 3822; cf. R. 4882, 4028-29.) Consequently, Olympus Hills' anchor tenant theory was merely an attempt to impose an obligation on Smith's to operate a supermarket.

C. THE DISTRICT COURT'S RULINGS ON ANCHOR TENANCY WERE PREJUDICIAL

The trial court candidly recognized that any error on its part regarding the anchor-tenant issue would result in significant error at trial.[12] (R. 3680.) Given the emphasis at trial by Olympus Hills of Smith's alleged anchor-tenant duties, even if some of the anchor tenant evidence may be otherwise admissible (see Opinion at pp. 12-13), Smith's was entitled to an instruction that Smith's had no duty to operate an anchor-type business. For this reason alone, Smith's is entitled to a new trial on the use and continuous operations claims.[13]

CONCLUSION

Smith's is entitled to dismissal of Olympus Hills' claims for forfeiture of the Lease, treble damages for unlawful detainer and damages for breach of the use clause. Smith's is also entitled to a new trial on Olympus Hills' claim for breach of the continuous operations clause and, if the Court does not grant Smith's request for dismissal, also on the use claim. The undersigned hereby certifies that this Petition for Rehearing is presented in good faith and not for delay.

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[12]At the end of the first day of trial, the court explained why its overruled Smith's objection to Olympus Hills' anchor-tenant argument during opening statement, and then stated:

> If I am wrong on that ruling, Mr. Jardine, then we will have error throughout the trial. And as a result -- I am thinking as a lawyer -- I don't think you're going to be prejudiced if you don't pop up every time, because I guarantee you there will be error throughout this trial if I'm wrong on that, and you lose on the covenant of good faith and fair dealing.

(R. 3680.)

[13]The anchor tenant issue not only dealt with Smith's selection of the Buy 'N Save, but was also directly relevant to whether closure of the leased premises for remodeling was material.

DATED this 12th day of January, 1995.

RAY, QUINNEY & NEBEKER

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of January, 1995, two true and correct copies of the foregoing PETITION FOR REHEARING OF APPELLANT SMITH'S FOOD & DRUG CENTERS, INC. were hand-delivered, to the following:

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